

NOT FOR PUBLICATION

NO. 25149

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

In the Interest of DOE CHILDREN:

JANE DOE, Born on September 25, 1991;
JOHN DOE, Born on November 9, 1993;
JANE DOE, Born on June 23, 1995; and
JANE DOE, Born on May 27, 1997, Minors

APPEAL FROM THE FAMILY COURT OF THE FIRST CIRCUIT
(FC-S NO. 98-05541)

MEMORANDUM OPINION

(By: Burns, C.J., Watanabe and Foley, JJ.)

Petitioner-Appellant mother (Mother) appeals from the April 23, 2002 and May 28, 2002 orders entered in the Family Court of the First Circuit, Judge R. Mark Browning presiding.

Mother gave birth to thirteen children by three different men. Father 1 is the biological father of the first three children: a male child born in 1974 or 1975, an adult (Child 1); a male child born in 1978 or 1979, an adult (Child 2); and a female child born on June 9, 1981 (Child 3) who is the mother of a male child born on August 15, 1996 (Grandson).

Father 2 is the biological father of the next two children, twin male children (Child 4 and Child 5) who were given up for adoption when they were very young.

Father 3 and Mother have been married since 1987. Father 3 is the biological father of the last eight children, born on the following dates:

Female child born on May 7, 1987 (Child 6)

Female child born on May 2, 1988 (Child 7)
Female child born on February 17, 1990 (Child 8)
Female child born September 25, 1991 (Child 9/Doe 1)
Male child born on November 9, 1993 (Child 10/Doe 2)
Female child born on June 23, 1995 (Child 11/Doe 3)
Female child born on May 27, 1997 (Child 12/Doe 4)
Female child born on May 7, 1999 (Child 13)

The April 23, 2002 "Order Awarding Permanent Custody, Re: [Child 11/Doe 3] and [Child 12/Doe 4]" terminated Mother's and Father 3's parental rights; appointed the State of Hawai'i, Department of Human Services (DHS), as permanent custodian of Child 11/Doe 3 and Child 12/Doe 4; and ordered the implementation of the January 27, 2002 Permanent Plan for adoption.

The May 28, 2002 Orders Concerning the Child Protective Act denied Mother's May 7, 2002 Motion for Reconsideration.

On June 26, 2002, the court entered its Findings of Fact and Conclusions of Law, Re: [Child 11/Doe 3] and [Child 12/Doe 4].

Mother's points of error are as follows:

A. The 'reasonable time' limits in [Hawaii Revised Statutes (HRS) § 587-73(a)(2)¹ (Supp. 2002)] are unconstitutionally vague.

¹ Hawaii Revised Statutes (HRS) § 587-73(a)(2) (Supp. 2002) provides, in relevant part, the following:

At the permanent plan hearing, the court shall consider fully all relevant prior and current information pertaining to the safe family home guidelines, as set forth in section 587-25, including but not limited to the report or reports submitted pursuant to section 587-40, and determine whether there exists clear and convincing evidence that:

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(2) It is not reasonably foreseeable that the child's legal mother, legal father, adjudicated, presumed, or concerned natural father as defined under chapter 578 are not presently willing and able to provide the child with a safe family home, even with the assistance of a service plan, within a reasonable period of time which shall not exceed
(continued...)

Mother was not given enough time to show she could provide a safe home as [M]other has several children to care for. In this case [M]other had eight children to care for, not the usual one or two that Chapter 587 would normally apply to.

B. The family court erred and was 'clearly erroneous' in finding that [M]other would not become able, in a reasonable amount of time, to provide [Child 11/Doe 3 and Child 12/Doe 4] with a safe family home, even with the assistance of a service plan, when at the same time the court found that [M]other could provide a safe family home for the older children.

We disagree and affirm.

BACKGROUND

The court entered 134 separately numbered findings of fact (FsOF). Mother challenges only FsOF nos. 104, 105, and 106. The following facts are undisputed.

DHS' involvement with this family began in 1986. Thereafter, DHS received frequent reports regarding Mother's lack of supervision and neglect of the first twelve of her thirteen children,² and the occurrence of physical and sexual abuse in the family home. As a result, except for Child 13, all of Mother's children have been the subject of DHS and family court intervention pursuant to the Child Protective Act, HRS Chapter 587. The following timeline illustrates the events that led to the termination of Mother's parental rights regarding Child 11/Doe 3 and Child 12/Doe 4.

¹(...continued)

two years from the date upon which the child was first placed under foster custody by the court.

² Child 13, a daughter of Mother and Father 3, was born after the August 18, 1998 intervention when the Honolulu Police Department removed Child 6, Child 7, Child 8, Child 9/Doe 1, Child 10/Doe 2, Child 11/Doe 3, and Child 12/Doe 4 from the custody of Mother and Father 3. The State of Hawai'i, Department of Human Services, has not removed Child 13 from the custody of Mother and Father 3 but continues to closely monitor the development of Child 13.

1.

General History

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| April 1986 | DHS first intervened because of a report that Mother's children were at home unsupervised. |
| September 22, 1986 | On or about this date, DHS was awarded foster custody of Child 2 and Child 3. |
| November 11, 1986 | DHS assumed protective custody of Child 4 and Child 5 because the latter was found with a ten-day-old fractured wrist. Mother subsequently placed Child 4 and Child 5 up for adoption because she could no longer bear the responsibility for their care. |
| January 26, 1987 | Child 2 and Child 3 were returned to Mother. |
| June 7, 1988 | DHS assumed foster custody of Child 1 because Mother could not handle his acting-out behaviors. |
| February 8, 1990 | DHS was awarded permanent custody of Child 1. |
| January 7, 1992 | As a consequence of the sexual abuse of Child 6, Child 7, and Child 8 by Child 2, he was removed from the family home and thereafter participated in therapeutic services to address his sexual abuse of his younger half-siblings. |
| March 1994 | After completing therapeutic services, Child 2 returned to live in the family home. |
| 1992-1998 | From 1992, until intervention by the Honolulu Police Department (HPD) on August 18, 1998, Child 1, a friend of Child 2, and other family friends sexually abused Child 6, Child 7, and Child 8 on multiple occasions. Child 6, Child 7, and Child 8 said they told Mother about the sexual abuse, but Mother did not take appropriate action to prevent further abuse. Mother |

admitted that she was told "a couple of times" about the sexual abuse but did nothing to stop future occurrences. Child 9/Doe 1 also stated that she was sexually abused but refused to talk about it and later retracted her statement. Child 9/Doe 1, however, displayed symptoms of having unresolved sexual abuse issues. Child 10/Doe 2 also displayed symptoms consistent with children who have been sexually abused, such as inappropriate sexual acting-out behavior.

February 27, 1998

DHS received a report that Child 2 physically abused Child 3 by holding a pillow on her face, punching her three times in the face, and causing a cut to her head. Child 3 reported that Mother was not protective of her and was unable to stop Child 2 from hitting her. DHS obtained voluntary foster custody of Child 3 and Grandson.

August 6, 1998

While drunk, Father 3 severely assaulted Mother. While Mother was holding Child 12/Doe 4, Father 3 threw an open can of beer at Mother, pulled Mother's hair and threw Mother to the ground. Later that night, Father 3 was arrested.

August 7, 1998

Child 3 alleged that Father 3 sexually abused her when she was nine. This report was not confirmed because Child 3 adamantly refused to participate in an interview at the Child Advocacy Center. DHS instructed Mother to keep Father 3 out of the family home until DHS could address the sexual abuse allegation and the domestic abuse incident.

August 18, 1998

Due to Mother's failure to keep Father 3 out of the family home, HPD assumed protective custody of Child 3, Grandson, Child 6, Child 7, Child 8, Child 9/Doe 1, Child 10/Doe 2, Child 11/Doe 3, and Child 12/Doe 4.

August 24, 1998

Pursuant to the Child Protective Act, HRS Chapter 587, DHS filed a Petition for Foster Custody of Child 3, Grandson,

Child 6, Child 7, Child 8,
Child 9/Doe 1, Child 10/Doe 2,
Child 11/Doe 3, and Child 12/Doe 4.

August 26, 1998

Except with respect to Child 12/Doe 4, Mother and Father 3 stipulated that based upon the report(s) submitted pursuant to HRS § 587-40 and the court record, there was an adequate basis to sustain the allegation that these children were physically and/or psychologically harmed by their family. The court awarded foster custody of these children to DHS and ordered the August 24, 1998 Service Plan into effect.

October 9, 1998

Immediately after the hearing requested by Mother and Father 3, the court invoked jurisdiction over Child 12/Doe 4, awarded foster custody of Child 12/Doe 4 to DHS, and ordered the August 24, 1998 Service Plan into effect for Child 12/Doe 4.

February 26, 1999

Dr. Lynne T. Nelson, Psy.D, conducted a psychological evaluation of Child 12/Doe 4.

May 7, 1999

Mother gave birth to Child 13. DHS continued to monitor her development.

August 17, 1999

Child 11/Doe 3 began individual therapy with Dr. Charlene Bell, Psy.D.

January 5, 2000

Child 12/Doe 4 also began individual therapy with Dr. Charlene Bell, Psy.D.

February 3, 2000

DHS filed a Motion for Order Awarding Permanent Custody and Establishing a Permanent Plan for all the children except the five oldest and Child 13.

April 17, 18, 19, 2000

The February 3, 2000 motion was heard by Judge R. Mark Browning. Judge Browning found that Mother and Father 3 "were never given an opportunity to be educated regarding the special needs of these seven children." The court continued DHS' Motion for Permanent Custody for six months and ordered the

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| | education and training of Mother and Father 3 regarding the special needs of their children. |
| January 8, 2001 | Trial on DHS's Motion for Permanent Custody resumed at which time the court ordered the parties to participate in a Judicial Pretrial Assistant Conference (JPAC Mediation). |
| January 23, 2001 | At the JPAC Mediation, the parties agreed to continue DHS' Motion for Permanent Custody. |
| February 2001 | Child 12/Doe 4 began individual therapy with Dr. Joshi Karuni-Peters. |
| April 2, 2001 | Child 9 and Child 10 were returned to the custody of Mother and Father 3 and DHS assumed family supervision. |
| April 16, 2001 | Child 6 and Child 7 were returned to the custody of Mother and Father 3 and DHS assumed family supervision. |
| August 25, 2001 | Child 12/Doe 4 moved into the foster home which continued to be her residence at the time of trial. |
| October 29, 2001 | Child 8 was returned to the custody of Mother and Father 3 and DHS assumed family supervision. |
| January 30, 2002 | The court set DHS' Motion for Permanent Plan regarding Child 11/Doe 3 and Child 12/Doe 4 for trial on April 22, 2002. |
| April 3, 2002 | Dr. John L. Wingert, Psy.D., conducted a psychological evaluation of Child 11 to determine the extent of damage caused by her parents' neglect and the physical and sexual abuse in the family home. |
| April 23, 2002 | The court entered its Order Awarding Permanent Custody, Re: [Child 11/Doe 3] and [Child 12/Doe 4]. |
| May 28, 2002 | The court entered the Orders Concerning Child Protective Act, which denied Mother's May 7, 2002 Motion for |

Reconsideration.

June 26, 2002

The court entered its Findings of Fact and Conclusions of Law, Re: [Child 11/Doe 3] and [Child 12/Doe 4].

2.

Special Needs for Child 11/Doe 3

Evaluations by Dr. Bell and Dr. Wingert indicate that Child 11/Doe 3 is a "special needs" child with severe emotional/psychological problems. Specifically, Child 11/Doe 3 suffers from Reactive Attachment Disorder of Early Childhood, Disinhibited Type, Post-Traumatic Stress Disorder, Features of Attention Deficit Hyperactivity Disorder, predominantly Hyperactive-Impulsive Type, Mixed Receptive-Expressive Language Disorder, and Borderline Intellectual Functioning. These emotional/psychological issues manifest themselves in multiple behavior problems. Symptoms of Reactive Attachment Disorder, Disinhibited Type, in Child 11/Doe 3 are a severe sexual acting-out behavior defined by excessive masturbation, a tendency to inappropriately bond quickly with strangers, inappropriate touching of adults and children, including Child 12/Doe 4, when they lived in the same foster home, and doll play depicting sexual acts. The family court found that if Child 11/Doe 3's Reactive Attachment Disorder, Disinhibited Type, is not properly treated, she is at risk of developing more severe behavioral problems.

Child 11/Doe 3's mental health disorder was caused by the abuse and neglect she suffered at an early age while in the

care of Mother and Father 3. The presence of Mother and Father 3 and siblings reminds Child 11/Doe 3 of past abuse and triggers her sexual acting-out behavior and symptoms of her emotional/psychological problems. For example, in early October 1999, when visits with Mother and Father 3 increased from once per week to twice per week, her sexual acting-out behavior also increased. The severity of Child 11/Doe 3's anxiety, depression, insomnia, labile moods, dissociation (trance states), ducking when touched, fearfulness (especially of men), and aggression also increased after contact with Mother, Father 3, and siblings. According to her preschool teacher, Child 11/Doe 3's behavior improved when her visits with Mother and Father 3 ceased. As of April 22, 2002, Mother and Father 3 had not seen Child 11/Doe 3 for about two years.

In addition to her emotional/psychological issues and related behavior problems, Child 11/Doe 3 also exhibits poor/delayed speech, developmental delays, and cognitive delays. Specifically, Child 11/Doe 3 is classified as a special education student who has a full scale I.Q. of 60 (below 1st percentile), a verbal I.Q. of 52 (below 1st percentile), and a performance I.Q. of 74 (4th percentile). Child 11/Doe 3 has an educational aide with her at all times when she is at school. Child 11/Doe 3 has difficulty maintaining focus and attention in the classroom; she continues to exhibit speech and language delays; and she continues to be aggressive towards other children, oppositional and defiant, manipulative, and demanding.

Taking into account her emotional/psychological and behavioral problems, and her poor/delayed, developmental, and cognitive delays, the family court found that Child 11/Doe 3 needs to be in a home where she receives a lot of individualized attention and where she is supervised and nurtured at all times.

The family court found that Mother and Father 3, who already have physical custody of six children with special needs, will be unable to provide Child 11/Doe 3 with the required individualized attention and constant supervision. Moreover, considering the behavioral and emotional setbacks that occur when Child 11/Doe 3 has contact with her family, the court found that returning Child 11/Doe 3 to the care of Mother and Father 3 would result in her irreparable emotional and psychological damage.

3.

Special Needs for Child 12/Doe 4

Evaluations by Dr. Nelson and Dr. Bell indicate that Child 12/Doe 4 is a "special needs" child with severe emotional/psychological problems such as Reactive Attachment Disorder, Post-Traumatic Stress Disorder, Disruptive Behavior Disorder, and Enuresis (bed-wetting). These emotional/psychological problem manifest themselves in multiple behavior problems. Specifically, Child 12/Doe 4 exhibits symptoms of Reactive Attachment Disorder, Disinhibited Type, such as not being able to bond with her caretakers, resisting affection, diminished ability to protest, lack of assertiveness, and diminished repertory of social interactions. Child 12/Doe 4

also engages in severe sexual acting-out behavior defined by masturbation and inappropriate touching of other persons, including her sister, Child 11/Doe 3. The family court found that if Child 12/Doe 4's Reactive Attachment Disorder is not properly treated, she is at risk of developing more severe psychological/emotional and related behavioral problems.

The family court also found that "[Child 12/Doe 4], while in the care of her parents, was subjected to severe sexual and physical harm. The trauma from the severe sexual and physical harm must have been horrific because the trauma has affected [Child 12/Doe 4's] physical[,] emotional, and cognitive development." The presence of Mother and Father 3 and siblings reminds Child 12/Doe 4 of past abuse and triggers her sexual acting-out behavior and symptoms of her emotional/psychological problems. In early October 1999, when Child 12/Doe 4's visits with Mother and Father 3 increased from once per week to twice per week, her sexual acting-out behavior also increased. As a result, visits with her parents were suspended on January 4, 2000, at Dr. Bell's recommendation. When visits were reinstituted, Child 12/Doe 4's sexual acting-out behavior resumed. As of April 22, 2002, Mother and Father had not seen Child 12/Doe 4 for about two years.

Their foster mother was unable to prevent Child 11/Doe 3 and Child 12/Doe 4 from touching each other in a sexual manner when together. This behavior prompted DHS to place Child 11/Doe 3 and Child 12/Doe 4 in separate foster homes.

Since separation, Child 12/Doe 4's sexual acting-out behaviors have stopped.

Child 12/Doe 4 also exhibits developmental and speech delays. Specifically, Child 12/Doe 4 has poor self-help skills, throws inappropriate tantrums, and in January 2000, she smeared feces on her body, which prompted her foster mother to request therapy for her. Moreover, although Child 12/Doe 4 was at one time toilet-trained, she recently began wetting the bed. It is unknown, however, whether the cause of the bed-wetting is psychological or physical.

Taking into account her emotional/psychological and behavioral problems, and her poor/delayed developmental and cognitive delays, the family court found that Child 12/Doe 4 needed to be in a structured home environment where she is the only child, where she receives a lot of individualized attention, and where she is supervised and nurtured at all times. The family court further found that Child 12/Doe 4's current foster home provides her with this individualized attention and support, as indicated by improvement in her overall behavior and condition. Specifically, Child 12/Doe 4 has not displayed any abnormal behavior and continues to do well in preschool. The family court found that the foster mother's structure and firmness have allowed Child 12/Doe 4 to grow and blossom. Her foster mother has worked with Child 12/Doe 4 to improve her self-help and speech and language skills, and continues to work on Child 12/Doe 4's fine motor skills. Child 12/Doe 4 is now

talkative, unlike in the past when she was quiet. Due to Child 12/Doe 4's progress, Dr. Karuni-Peters will be decreasing the frequency of therapy with her.

In addition to Child 12/Doe 4's progress under the care of her foster mother, the family court found that returning Child 12/Doe 4 to the "care of Mother and Father would result in irreparable emotional and psychological damage[.]" According to the testimony by Tracie Liufau-Maiava, an expert in the area of social work and child protective services, Mother and Father 3 are capable of taking care of only Child 13. Moreover, Child 12/Doe 4 is not bonded with her parents, she does not ask for them, nor does she show any emotional response when they were mentioned by Dr. Karuni-Peters. The court also found that because of the demands placed on Mother and Father in caring for six other children, five of whom have special needs, Child 12/Doe 4 would not be able to receive the individualized attention she needs if returned to Mother and Father 3.

4.

Other Children

Child 6, Child 7, Child 8, Child 9/Doe 1, and Child 10/Doe 2 were also physically and sexually abused and neglected while in Mother's care prior to DHS's August 1998 intervention. As a result of such abuse and neglect, Dr. Wingert classifies these children as special needs children with psychological, emotional, and behavioral issues.

Specifically, according to their therapist, Dr. Val

Umphress, Ph.D, Child 9/Doe 1 and Child 10/Doe 2 suffer from Adjustment Disorder with Disturbance of Mixed Emotional Features, Chronic. Child 9/Doe 1 and Child 10/Doe 2 also have unresolved sexual abuse issues as well as neglect and attachment issues that manifest in frequent sulking, crying, lying, destroying property, negative and disrespectful attitude and aggression towards friends and family members, difficulty in maintaining friendships, complaining about house rules and responsibilities, and inappropriate sexual gestures. Dr. Umphress also diagnosed Child 10/Doe 2 with Attention Deficit Hyperactivity Disorder. Both children began individual therapy on August 28, 1999 and continue to see Dr. Umphress on a bi-monthly basis.

Child 6, Child 7 and Child 8 also require individual therapy to address their psychological, emotional, and behavioral issues. Dr. Bell diagnosed these children with dysthymia (a chronic state of depression), post-traumatic stress disorder (dysthymia that lasts longer than six months), reactive attachment disorder (inability to bond with a caregiver and/or inappropriate bonding with strangers), and an adjustment disorder with mixed disturbance of emotions and conduct (i.e., acting-out behaviors, aggression, sexualized behaviors, and lying).

Despite the psychological, emotional, and behavioral problems of Child 6, Child 7, Child 8, Child 9/Doe 1 and Child 10/Doe 2, the family court returned these children to the care of Mother and Father 3 for the following reasons: DHS found that Child 6, Child 7, and Child 8 appear closely bonded to their

parents, as observed in their interactions during supervised visits. Dr. Umphress opined that Child 9/Doe 1 and Child 10/Doe 2 "would decompensate and regress psychologically if they remained in foster care." Dr. Bell also advised that "it would be more advantageous for [Child 6] and [Child 7] to return to their parents' care (which was minimally safe) because the continued placement in foster care would create anger and resentment resulting in a regression in their behavior and psychological well-being."

The family court found that with six children in the family home, all of whom

have multiple needs of various degrees, . . . , Mother and [Father 3] have reached the limit in the number of children, . . . for whom they can provide appropriate and adequate care. Adding two additional special needs children, such as [Child 11/Doe 3] and [Child 12/Doe 4], who require a lot of undivided individualized attention, will result in all of the children being subjected to abuse and neglect."

The court further found that the return of Child 11/Doe 3 and Child 12/Doe 4

to Mother's and [Father 3's] care would overwhelm Mother and Father, and expose [Child 11/Doe 3] and [Child 12/Doe 4] to further threatened psychological trauma and harm, and threatened neglect. It would also expose the other children to threatened harm because it would negatively affect Mother's and Father's ability to adequately care for the needs of their other children in the home.

5.

Paternal Grandfather

The presence of the father of Father 3 (Paternal Grandfather) in the family home also affects the adequacy with which Mother and Father 3 can care for their children. At the time of the April 22, 2002 trial, Paternal Grandfather lived in

the family home, suffering from colon cancer and needing the support of his family. Paternal Grandfather also had an open case under HRS Chapter 587 regarding his minor daughter, Father 3's half-sister, who is in foster care.

6.

Mother and Father 3

According to DHS and Child Protective Services (CPS) records, Mother has been a victim of domestic violence by Father 1, Father 2, and Father 3. Mother also has a tendency to minimize problems regarding herself and her family. When DHS intervened and assumed foster custody of seven of her children, Mother did not understand that, or how, those children had been harmed and/or were in danger of future harm so as to provide a valid reason or reasons for their removal from her care.

Mother has visited a therapist on a bi-weekly basis since March 1999, but did not make any notable progress. On October 27, 1999, her therapist, Marci Miller, APN, MS, reported that Mother "continues to have difficulties with judgement, self-esteem, limited insight, and little ability to understand how her children have been impacted by her parenting style."

Social worker Elizabeth Iseke also doubted Mother's parenting ability and testified that the parenting classes Mother had completed were not enough to ensure that Mother could adequately parent and manage the different special needs of each child.

Father 3 is an alcoholic. Although the November 2,

1999 service plan ordered him to attend Alcoholics Anonymous (AA) meetings three times a week, he has not attended any AA meetings. Father 3 also has a criminal record. He was convicted in 1992 of Prohibited Place to Keep Firearm and Use of Firearm in Felony. He was convicted in 1998 of Abuse of Family Member and Theft in the Fourth Degree.

Since June 2, 1999, for approximately two to three times a month, Father 3 attended therapy with Kyle Chang (Chang) to address his unhealthy behaviors (alcohol abuse, physical and psychological abuse, and neglect). According to Chang, Father 3 acknowledged that his alcohol abuse, and his physical and psychological abuse of them, harmed Mother and the children. Father 3 wrote apology letters to both Mother and stepdaughter acknowledging his abusive behavior and stating his wish to heal their relationship.

Despite Father 3's improvements, however, Chang at trial was "not too sure" whether Father 3 was able to provide a safe family home for all eight of his children. Dr. Brenda Wong, CPS Team psychologist, had previously opined that Father 3's "improvement appears marginal at this point and it may be as far as [he] can get."

Additionally, in a November 19, 1999 report, a CPS Multidisciplinary Team, whose function was to gather information and make an objective assessment of Mother and Father 3's ability to care for their children, decided as follows:

All of the children except [Child 13] have special needs of varying types, which require additional care. [Child 13] is

reported to be a healthy baby and the only child noted to have average care needs.

[Mother] has a history of domestic violence with [Father 3]. She has neither provided structure in her home for her older children nor been a protective parent, especially with regard to the abuse suffered by her children. [Mother] is assessed as an inadequate caretaker for her children with special needs. She is a minimally adequate caretaker for her newborn, [Child 13], as she is currently motivated to participate in services and is meeting her infant's needs. [Father 3] has been the perpetrator of abuse to his children. He, too, is assessed as a minimally adequate caretaker for [Child 13] as he has been demonstrating appropriate and consistent parenting skills and an inadequate caretaker for his older children.

The social support system for the parents is inadequate and unable to compensate for their own inadequacies in the care of their older children with special needs. The social support for the parents in their care of [Child 13] is adequate only with increased services in the home. Therefore, the parents' home is, [sic] unsafe and inadequate for [Child 6, Child 7, Child 8, Child 9/Doe 1, Child 10/Doe 2, Child 11/Doe 3 and Child 12/Doe 4]. The home is safe and adequate for [Child 13] only with an increase of services in the home.

(Emphases in original.)

RELEVANT STATUTES

HRS § 587-73(a) (Supp. 2002) states as follows:

At the permanent plan hearing, the court shall consider fully all relevant prior and current information pertaining to the safe family home guidelines, as set for in section 587-25, including but not limited to the report or reports submitted pursuant to section 587-40, and determine whether there exists clear and convincing evidence that:

- (1) The child's legal mother, legal father, adjudicated, presumed, or concerned natural father as defined under chapter 578 are not presently willing and able to provide the child with a safe family home, even with the assistance of a service plan;
- (2) It is not reasonably foreseeable that the child's legal mother, legal father, adjudicated, presumed, or concerned natural father as defined under chapter 578 will become willing and able to provide the child with a safe family home, even with the assistance of a service plan, within a reasonable period of time which shall not exceed two years from the date upon which the child was first placed under foster custody by the court;
- (3) The proposed permanent plan will assist in achieving the goal which is in the best interests of the child; provided that the court shall presume that:
 - A) It is in the best interests of a child to be promptly and permanently placed with responsible

and competent substitute parents and families in safe and secure homes; and

- B) The presumption increases in importance proportionate to the youth of the child upon the date that the child was first placed under foster custody by the court.

HRS § 587-25 (1993) states as follows:

(a) The following guidelines shall be fully considered when determining whether the child's family is willing and able to provide the child with a safe family home:

- (1) The current facts relating to the child which include:
 - (A) Age and vulnerability;
 - (B) Psychological, medical, and dental needs;
 - (C) Peer and family relationships and bonding abilities;
 - (D) Developmental growth and schooling;
 - (E) Current living situation;
 - (F) Fear of being in the family home; and
 - (G) Services provided the child;
- (2) The initial and any subsequent reports of harm and/or threatened harm suffered by the child;
- (3) Date(s) and reason for child's placement out of the home, description, appropriateness, and location of the placement and who has placement responsibility;
- (4) Historical facts relating to the alleged perpetrator and other appropriate family members who are parties which include:
 - (A) Birthplace and family of origin;
 - (B) How they were parented;
 - (C) Marital/relationship history; and
 - (D) Prior involvement in services;
- (5) The results of psychiatric/psychological/developmental evaluations of the child, the alleged perpetrator and other appropriate family members who are parties;
- (6) Whether there is a history of abusive or assaultive conduct by the child's family or others who have access to the family home;
- (7) Whether there is a history of substance abuse by the child's family or others who have access to the family home;
- (8) Whether the alleged perpetrator(s) has acknowledged and apologized for the harm;
- (9) Whether the non-perpetrator(s) who reside in the family home has demonstrated the ability to protect the child from further harm and to insure that any current protective orders are enforced;

- (10) Whether there is a support system of extended family and/or friends available to the child's family;
- (11) Whether the child's family has demonstrated an understanding and utilization of the recommended/court ordered services designated to effectuate a safe home for the child;
- (12) Whether the child's family has resolved or can resolve the identified safety issues in the family home within a reasonable period of time;
- (13) Whether the child's family has demonstrated the ability to understand and adequately parent the child especially in areas of communication, nurturing, child development, perception of the child and meeting the child's physical and emotional needs; and
- (14) Assessment (to include the demonstrated ability of the child's family to provide a safe family home for the child) and recommendation.

(b) The court shall consider the likelihood that the current situation presented by the guidelines set forth in subsection (a) will continue in the reasonably foreseeable future and the likelihood that the court will receive timely notice of any changes or changes in the family's willingness and ability to provide the child with a safe family home.

POINTS OF ERROR

On appeal, Mother contends that the family court erred because: (1) the clause "within a reasonable period of time which shall not exceed two years from the date upon which the child was first placed under foster custody by the court" as stated in HRS § 587-73(a) (2) is unconstitutionally vague; (2) Mother was not allowed sufficient time to provide a safe home for Child 11/Doe 3 and Child 12/Doe 4; and (3) the family court cannot terminate a parent's parental rights to a child pursuant to HRS § 587-73(a), when that parent has demonstrated the ability to provide a safe family home, with the assistance of a service plan, for that parent's other children.

STANDARD OF REVIEW

The family court's determinations pursuant to HRS

§ 587-73(a) with respect to (1) whether a child's parent is willing and able to provide a safe family home for the child and (2) whether it is reasonably foreseeable that a child's parent will become willing and able to provide a safe family home within a reasonable period of time are reviewed on appeal under the "clearly erroneous" standard. In re John Doe, 89 Hawai'i 477, 486-87, 974 P.2d 1067, 1076-77 (App. 1999), *cert. denied*, (March 17, 1999).

A finding of fact "is clearly erroneous when (1) the record lacks substantial evidence to support the finding, or (2) despite substantial evidence in support of the finding, the appellate court is nonetheless left with a definite and firm conviction that a mistake has been made." State v. Okumura, 78 Hawai'i 383, 392, 894 P.2d 80, 89 (1995) (citation omitted)."

Conclusions of law are reviewed *de novo* under the right/wrong standard. In re Jane Doe, 84 Hawai'i at 46, 928 P.2d at 888 (citations omitted).

DISCUSSION

1.

As traditionally applied to criminal statutes, the "void for vagueness" doctrine requires inquiry into the following: (a) whether the statute provides fair warning of proscribed conduct; (b) whether the statute provides clear guidelines so as to prevent arbitrary application and enforcement; and (c) whether the statute "overreaches" by lack of clarity so as to prohibit lawful or constitutionally protected,

as well as unlawful, activities. In the Interest of a Male Child, 8 Haw. App. 66, 68, 793 P.2d 669, 670 (1990) (citing Woodruff v. Keale, 64 Haw. 85, 95, 637 P.2d 760, 767 (1981)).

In the 1990 opinion cited above, this court concluded that HRS § 571-61(b)(1)(E) (1985), which is the same as HRS § 571-61(b)(1)(E) (1993), is not unconstitutionally vague. That statutory section then stated and now states that "[t]he family courts may terminate the parental rights in respect to any child as to any legal parent . . . [w]hose child has been removed from the parent's physical custody pursuant to legally authorized judicial action under section 571-11(9), and who is found to be unable to provide now and in the foreseeable future the care necessary for the well-being of the child."

Similarly, the phrase "within a reasonable period of time which shall not exceed two years from the date upon which the child was first placed under foster custody by the court" as stated in HRS § 587-73(a)(2) is not unconstitutionally vague. HRS § 587-73(a)(2) provides "fair warning of proscribed conduct" as it "warns" Mother that if the State can show, by clear and convincing evidence, that the requirements of the other parts of HRS § 587-73(a) have been satisfied and that "[i]t is not reasonably foreseeable that [Mother] will become willing and able to provide the child with a safe family home, even with the assistance of a service plan, within a reasonable period of time which shall not exceed two years from the date upon which the child was first placed under foster custody by the court[,]"

the court will comply with HRS § 587-73(b), terminate Mother's parental rights, and award permanent custody of the child to an appropriate authorized agency.³

HRS § 587-73(a)(2) also provides Mother with "clear guidelines." It requires the family court to "consider fully all relevant prior and current information pertaining to the safe family home guidelines, as set forth in section 587-25" when deciding the question.

Lastly, HRS § 587-73(a)(2) does not "overreach by its lack of clarity" as it specifies the allowable "reasonable period

³ In the opening brief, counsel for Mother states as follows:

Originally 587-73 stated under Permanent Plan hearing a.(2) that the period of time shall not exceed two years [sic] from the date upon which the child was first placed under foster custody by the court.

Then under (e) it states that the court shall order a permanent plan for the child within three years of the date upon which the child was first placed under foster custody by the court, if the child's family is not willing and able to provide the child with a safe family home, even with the assistance of a service plan. The problem is that the family court in Hawaii, uses the reasonable time limit to mean just about anything it may feel like. In fact, lately, the family court is using a one year period. If the State want [sic] to move for permanent custody in three months or in three or more years the family court just goes along with ordering permanent custody.

The mother's [sic] are misled, it is difficult for attorneys to advise the clients, and the children are taken away before the parents know what is happening to them. This is all done in the, so called, best interest of the children.

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In this case there are eight children that should be living together. Mother should have been given more time to provide a safe home.

It appears that counsel is unaware that (a) HRS § 587-73(e) was repealed by Act 78, 2000, and (b) HRS § 587-73(a)(2) (Supp. 2002) specifies that its "reasonable period of time . . . shall not exceed two years from the date upon which the child was first placed under foster custody by the court[.]" In other words, although there is a maximum time, there is no minimum time.

of time . . . shall not exceed two years from the date upon which the child was first placed under foster custody by the court[.]"⁴

⁴ The United States Code Annotated states, in 42 U.S.C.A. § 675, in relevant part, as follows:

TITLE 42. THE PUBLIC HEALTH AND WELFARE
CHAPTER 7--SOCIAL SECURITY
SUBCHAPTER IV--GRANTS TO STATES FOR AID AND SERVICES TO NEEDY FAMILIES WITH CHILDREN AND FOR CHILD-WELFARE SERVICES
PART E--FEDERAL PAYMENTS FOR FOSTER CARE AND ADOPTION ASSISTANCE

§ 675. Definitions

As used in this part or part B of this subchapter:

(1) The term "case plan" means a written document which includes at least the following:

(A) A description of the type of home or institution in which a child is to be placed, including a discussion of the safety and appropriateness of the placement and how the agency which is responsible for the child plans to carry out the voluntary placement agreement entered into or judicial determination made with respect to the child in accordance with section 672(a)(1) of this title.

(B) A plan for assuring that the child receives safe and proper care and that services are provided to the parents, child, and foster parents in order to improve the conditions in the parents' home, facilitate return of the child to his own safe home or the permanent placement of the child, and address the needs of the child while in foster care, including a discussion of the appropriateness of the services that have been provided to the child under the plan.

. . . .

(E) In the case of a child with respect to whom the permanency plan is adoption or placement in another permanent home, documentation of the steps the agency is taking to find an adoptive family or other permanent living arrangement for the child, to place the child with an adoptive family, a fit and willing relative, a legal guardian, or in another planned permanent living arrangement, and to finalize the adoption or legal guardianship. At a minimum, such documentation shall include child specific recruitment efforts such as the use of State, regional, and national adoption exchanges including electronic exchange systems.

(2) The term "parents" means biological or adoptive parents or legal guardians, as determined by applicable State law.

(3) The term "adoption assistance agreement" means a written agreement, binding on the parties to the agreement, between the State agency, other relevant agencies, and the prospective adoptive parents of a minor child which at a minimum (A) specifies the nature and amount of any payments, services, and assistance to be provided under such agreement, and (B) stipulates that the agreement shall remain in effect regardless of the State of which the adoptive parents are residents at any given time. The agreement shall contain provisions for the protection (under an interstate compact approved by the Secretary or otherwise) of the interests of the child in cases where the

(continued...)

⁴(...continued)

adoptive parents and child move to another State while the agreement is effective.

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(5) The term "case review system" means a procedure for assuring that--

(A) each child has a case plan designed to achieve placement in a safe setting that is the least restrictive (most family like) and most appropriate setting available and in close proximity to the parents' home, consistent with the best interest and special needs of the child, which--

(i) if the child has been placed in a foster family home or child-care institution a substantial distance from the home of the parents of the child, or in a State different from the State in which such home is located, sets forth the reasons why such placement is in the best interests of the child, and

(ii) if the child has been placed in foster care outside the State in which the home of the parents of the child is located, requires that, periodically, but not less frequently than every 12 months, a caseworker on the staff of the State agency of the State in which the home of the parents of the child is located, or of the State in which the child has been placed, visit such child in such home or institution and submit a report on such visit to the State agency of the State in which the home of the parents of the child is located,

(B) the status of each child is reviewed periodically but no less frequently than once every six months by either a court or by administrative review (as defined in paragraph (6)) in order to determine the safety of the child the continuing necessity for and appropriateness of the placement, the extent of compliance with the case plan, and the extent of progress which has been made toward alleviating or mitigating the causes necessitating placement in foster care, and to project a likely date by which the child may be returned to and safely maintained in the home or placed for adoption or legal guardianship,

(C) with respect to each such child, procedural safeguards will be applied, among other things, to assure each child in foster care under the supervision of the State of a permanency hearing to be held, in a family or juvenile court or another court (including a tribal court) of competent jurisdiction, or by an administrative body appointed or approved by the court, no later than 12 months after the date the child is considered to have entered foster care (as determined under subparagraph (F)) (and not less frequently than every 12 months thereafter during the continuation of foster care), which hearing shall determine the permanency plan for the child that includes whether, and if applicable when, the child will be returned to the parent, placed for adoption and the State will file a petition for termination of parental rights, or referred for legal guardianship, or (in cases where the State agency has documented to the State court a compelling reason for determining that it would not be in the best interests of the child to return home, be referred for termination of parental rights, or be placed for adoption, with a fit and willing relative, or with a legal guardian) placed in another planned permanent living arrangement and, in the case of a child described in subparagraph (A)(ii), whether the out-of-State placement continues to be appropriate and in the best interests of the child, and, in the case of a child who has attained age 16, the services needed to assist the child to make the transition from foster care to independent living; and procedural safeguards shall also be applied with respect to parental rights pertaining to
(continued...)

Where the language of a statute is plain and unambiguous, the court's only duty is to give effect to its plain and obvious meaning. Child Support Enforcement Agency v. Carlin, 96 Hawai'i 373, 379, 31 P.3d 230, 236 (2001). The legislative intent behind the two-year time limit further proves that HRS § 587-73(a)(2) is not vague. In 1999, the legislature reduced the "reasonable time limit" from three years to two years. The purpose of this specific change was to "expedite permanency for children in foster care."

2.

Mother argues that she was not allowed sufficient time to provide a safe home for Child 11/Doe 3 and Child 12/Doe 4. Considering that the court awarded foster custody of Child 11/Doe

⁴(...continued)

the removal of the child from the home of his parents, to a change in the child's placement, and to any determination affecting visitation privileges of parents;

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(F) a child shall be considered to have entered foster care on the earlier of

(i) the date of the first judicial finding that the child has been subjected to child abuse or neglect; or

(ii) the date that is 60 days after the date on which the child is removed from the home; and

(G) the foster parents (if any) of a child and any preadoptive parent or relative providing care for the child are provided with notice of, and an opportunity to be heard in, any review or hearing to be held with respect to the child, except that this subparagraph shall not be construed to require that any foster parent, preadoptive parent, or relative providing care for the child be made a party to such a review or hearing solely on the basis of such notice and opportunity to be heard.

(6) The term "administrative review" means a review open to the participation of the parents of the child, conducted by a panel of appropriate persons at least one of whom is not responsible for the case management of, or the delivery of services to, either the child or the parents who are the subject of the review.

3 to DHS on August 26, 1998, and awarded foster custody of Child 12/Doe 4 to DHS on October 9, 1998, and the court did not terminate Mother's parental rights until April 23, 2002, and considering the other relevant facts, this argument has no merit.

3.

Mother argues that

In this case [M]other had eight children to care for. (Fof 104, 105)

This is not a usual number of children that HRS Chapter 587 would be applied to and therefore the reasonable time limits should not apply and also this shows that the time limits are unconstitutionally vague.

Suppose a mother had 20 children? Would it seem reasonable to apply the same time limits to 20 children as to one or two? A reasonable answer to this question is No!

In this case [M]other has eight children and should have been allowed a longer time for the time limit to be 'reasonable'.

We disagree.

a.

Hawai'i law seeks to provide each child with a safe family home within a reasonable period of time not exceeding two years from the date upon which the child was first placed under foster custody by the court. The number of the child's siblings and the negative impact that number of siblings has on the ability of the parents to provide the child with a safe family home within that period of time is not a valid reason for extending that period of time.

b.

The FsOF state, in relevant part, as follows:

104. Even though Mother can provide a safe home for [Child 6, Child 7, Child 8, Child 9/Doe 1 and Child 10/Doe 2], with the assistance of a service plan, and a safe home for

[Child 13] without court intervention, the special needs of these children in Mother's and [Father 3's] care are so great and extensive, that Mother and [Father 3] cannot provide the individualized care and attention [Child 11/Doe 3] and [Child 12/Doe 4] need. Returning [Child 11/Doe 3] and [Child 12/Doe 4] to Mother's and [Father 3's] care would overwhelm Mother and [Father 3], and expose [Child 11/Doe 3] and [Child 12/Doe 4] to further threatened psychological trauma and harm, and threatened neglect. It would also expose the other children to threatened harm because it would negatively affect Mother's and [Father 3's] ability to adequately care for the needs of their other children in the home.

105. Mother is not presently willing and able to provide [Child 11/Doe 3] and [Child 12/Doe 4] with a safe family home, even with the assistance of a service plan because their foregoing problems continue to exist. There are no reasonable services in the community that would allow Mother to continue to care for [Child 6, Child 7, Child 8, Child 9/Doe 1, Child 10/Doe 2, and Child 13], and to return [Child 11/Doe 3] and [Child 12/Doe 4] to Mother's and [Father 3's] care and to allow Mother to provide a safe home for [Child 11/Doe 3] and [Child 12/Doe 4] . . . , even with the assistance of a service plan.

106. It is not reasonably foreseeable that Mother will become willing and able to provide [Child 11/Doe 3] and [Child 12/Doe 4] with a safe family home, even with the assistance of a service plan because there is no likelihood that she would sufficiently resolve her problems, and gain the necessary skills to adequately care for all of [Child 11/Doe 3's] and [Child 12/Doe 4's] needs and the needs of her children presently in her and [Father 3's] care at any identifiable point in the future.

Mother argues that the family court cannot terminate her parental rights to a child pursuant to HRS § 587-73(a) if she demonstrates the ability to provide a safe home, with the assistance of a service plan, for any of her other children. In other words, a mother's ability to provide a safe family home for one specific child proves, as a matter of law, her ability to provide a safe family home for all of her other children, whether special needy or not and no matter how many. We disagree.

HRS § 587-25(a) states that "[t]he following guidelines shall be fully considered when determining whether the child's family is willing and able to provide the child with a safe family home." In other words, the inquiry is to be made

regarding the child by examining the situation as it will exist if and when the child is placed with that family in that family home. The court must apply the guidelines and determine whether the parent is or the parents are willing and able to provide that child with a safe family home.

This individual application of HRS § 587-25 explains why the family court granted Mother custody of six children and not eight children. Specifically, as a result of psychiatric, psychological, and developmental evaluations of each child, the court found that the six children are bonded with Mother and separation from her will cause them more harm. In contrast, Child 11/Doe 3 and Child 12/Doe 4 are not bonded with Mother. Psychiatric evaluations of them indicate that their contact with their family triggers sexual acting out behavior and will cause irreparable emotional, psychological, and developmental damage to them.

The record contains substantial evidence⁵ supporting the family court's FsOF nos. 104, 105, and 106. We are not presented with the question whether the record supports the family court's decision that Mother and Father 3 are able to provide Child 6, Child 7, Child 8, Child 9/Doe 1, Child 10/Doe 2, and Child 13 with a safe family home with the assistance of service plans.

CONCLUSION

⁵ "Substantial evidence" is credible evidence which is of sufficient quality and probative value to enable a person of reasonable caution to support the conclusion. In re Doe, 96 Haw. at 190, 20 P.2d at 623.

Accordingly, we affirm (1) the April 23, 2002 Order Awarding Permanent Custody, Re: [Child 11/Doe 3] and [Child 12/Doe 4], and (2) the May 28, 2002 Orders Concerning the Child Protective Act.

DATED: Honolulu, Hawai'i, December 2, 2003.

On the briefs:

Joseph Dubiel
for Mother-Appellant.

Chief Judge

Patrick A. Pascual and
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Services-Appellee.

Associate Judge

Associate Judge